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RESTATEMENT OF THE LAW OF CONTRACTS OF THE  
AMERICAN LAW INSTITUTE, SECTIONS 512-525,\*  
WITH MISSOURI ANNOTATIONS†

BY TYRRELL WILLIAMS

ILLEGAL BARGAINS

TOPIC A. DEFINITION.

Section 512. DEFINITION OF ILLEGAL BARGAIN.

A bargain is illegal within the meaning of the Restatement of this Subject if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy.

*Annotation:*

This Section is in accord with Missouri law. In *Haggerty v. St. Louis Ice Mfg. Co.* (1898) 143 Mo. 238, 44 S. W. 1114, the subject matter of the bargain, storing of game out of season, was *criminal* under Missouri Statutes and so the bargain was not a lawful contract. Missouri courts apply the same test when the subject matter of the alleged contract involves the commission of a *federal crime*. *Tandy v. Elmore-Cooper Live Stock Comm. Co.* (1905) 113 Mo. App. 409, 87 S. W. 614, inclosing the public domain. In *Bank of Dexter v. Simmons* (Mo. App. 1918) 204 S. W. 837, there was a bargain to commit a *tort*, namely, fraud on the stockholders of the bank, and so the bargain was unenforceable. *Cooley Credit Co. v. Townsend* (1908) 132 Mo. App. 390, 111 S. W. 894, was a bargain against *public policy*, namely, assign-

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ment by a policeman of his salary, and therefore not a valid contract.

## TOPIC B. BARGAINS IN RESTRAINT OF TRADE.

### Section 513. DEFINITION OF A BARGAIN IN RESTRAINT OF TRADE.

A bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation.

#### *Annotation:*

This Section is carefully formulated so as to include not only (1) bargains in restraint of trade which are *illegal*, but also (2) bargains in restraint of trade which are *legal*, and at the same time to exclude (3) bargains which restrain activities *outside the domain of trade*.

Illustrations of (1) can be found in: *State ex rel. Barrett v. Boeckeler Lumber Co.* (1923) 301 Mo. 445, 256 S. W. 175, bargain between nineteen lumber dealers to fix prices; *State ex inf. Hadley v. Standard Oil Co.* (1909) 218 Mo. 1, 116 S. W. 902, bargain between three oil producers to prevent competition by dividing up state between two and deceiving public into thinking that third was a competitor of other two; *Finck v. Schneider Granite Co.* (1905) 187 Mo. 244, 86 S. W. 213, bargain legal on face made illegal by other bargains; *Fope-Turnbo v. Bedford* (1910) 147 Mo. App. 692, 127 S. W. 426, bargain between manufacturer and retailer with promise for exclusive use of former's product.

Illustrations of (2) can be found in: *State ex rel. Barrett v. Carondelet Planing Mill Co.* (1925) 309 Mo. 353, 274 S. W. 780, agreement among competing planing mill owners for exclusive use of standard forms in submitting bids; *Home Telephone Co. v. Sarcoux Light & Tel. Co.* (1911) 236 Mo. 114, 139 S. W. 108, agreement between telephone companies for exchanging facilities in long distance service; *Presbury v. Fisher* (1853) 18 Mo. 50, valid bond with restrictive covenant given by sellers of newspaper as part consideration for sale.

The possibility of (3) is recognized in: *State ex inf. Crow v. Firemen's Fund Ins. Co.* (1899) 152 Mo. 1, 52 S. W. 595, where it was held that a so-called "social club" was a "plain, palpable, but bungling . . . agreement . . . organized to evade the anti-trust laws of Missouri, but wholly inefficient for such a purpose." See also *Valley Spring Hog Ranch Co. v. Plagmann* (1920) 282 Mo. 1, 220 S. W. 1, city ordinance contracting for disposal of garbage is primarily a health measure and not the establishment of "a business of any kind".

**Section 514. WHEN A BARGAIN IN RESTRAINT OF TRADE IS ILLEGAL.**

A bargain in restraint of trade is illegal if the restraint is unreasonable.

*Annotation:*

*Standard Oil Co. of N. J. v. U. S.* (1911) 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. 502, is authority for the following propositions: (1) at common law a bargain in restraint of trade to be illegal must be unreasonable; (2) at common law any bargain which makes possible an undue restraint on trade with possible injury to the public is an unreasonable bargain and illegal; (3) the Federal Anti-trust Statute of 1890 merely adopted the common law and applied it to interstate commerce with certain important changes in procedure. This Section 514 is undoubtedly in accord with federal law.

In Missouri an anti-trust statute containing drastic penalties was adopted in 1889 and amplified in 1891, 1895, 1897 and 1907. The present statute is R. S. Mo. 1929, Sections 8700 to 8744. For history of Missouri legislation see: *Co-operative Live Stock Com. Co. v. Browning* (1914) 260 Mo. 324, 168 S. W. 934 and *State ex inf. Barker v. Armour Packing Co.* (1915) 265 Mo. 121, 176 S. W. 382.

The *rule of reason* recognized by the Restatement and firmly established as federal law was supposed by many lawyers to be approved in a case arising under the Missouri Statute, namely, *State ex inf. Major v. International Harvester Co.* (1911) 237 Mo. 369, 141 S. W. 672, where the court said: "The Supreme Court of the United States held that the act of Congress which prohibits contracts in restraint of trade was to be construed in the light of reason, and when so construed it did not forbid the making of every contract that had for its purpose a restraint of trade, but only such as had for its purpose an unreasonable restraint of trade." In a later case, *State ex rel. Barrett v. Boeckeler Lumber Co.* (1923) 301 Mo. 445, 256 S. W. 175, it was announced that our Supreme Court was not committed "to the theory of legality of contracts in reasonable restraint of trade." The same case apparently approved this comment quoted from an earlier case: "Even if that was not the common law, yet there is nothing in either the State or Federal Constitution which prevents the enactment of a statute prohibiting the making of all contracts in restraint of trade, whether reasonable or unreasonable." The Court, construing what is now R. S. Mo. 1929, Section 8703, added: "When the Legislature has denounced all agreements, understandings, etc., which tend to lessen full competition, or which

tend to increase market prices, we may not construe such language to mean: All agreements which tend to lessen competition, except those which do not unreasonably lessen competition, and all agreements which tend to increase prices, except those which do not unreasonably increase prices, shall be deemed against public policy and void. Other courts upon different statutes may have been justified in applying the 'rule of reason'. We will not undertake to distinguish such cases. Under the clear and explicit language of our statute, there is no room for such construction."

In the case last cited the combination undoubtedly was unreasonable, when tested by the Federal law, because it tended to injure the public by raising prices for an essential commodity. The same may be said of each one of the other successful prosecutions under the Missouri Anti-Trust Statute. See particularly: *State ex inf. Major v. International Harvester Co.* (1911) 237 Mo. 369, 141 S. W. 672; *State ex inf. Hadley v. Standard Oil Co.* (1909) 218 Mo. 1, 116 S. W. 902; *State ex inf. Crow v. Armour Packing Co.* (1903) 173 Mo. 356, 73 S. W. 645.

There is probably no practical variance between the Restatement and Missouri statutory law, but there is a theoretical variance because in Missouri the statutory language alone is to be made the test without any modifying use of the words reasonable or unreasonable. If R. S. Mo. 1929, Sections 8701, 8702 and 8703, are to be regarded as particular specifications of the more general principle formulated in R. S. Mo. 1929, Section 8700, then there is certainly no practical variance because the acts specified in R. S. Mo. 1929, Sections 8701, 8702 and 8703, are in unreasonable restraint of trade, according to the Restatement, and therefore illegal. In a case decided after the Missouri repudiation of the federal rule of reason, *State ex rel. Barrett v. Carondelet Planing Mill Co.* (1925) 309 Mo. 353, 274 S. W. 780, which involved an unsuccessful prosecution of competing manufacturers for having bargained to submit bids for St. Louis work, on agreed standard forms, the Court, when discharging the respondents on the facts, found there was a "reasonable explanation" of at least one of the practices relied upon by the prosecution.

Apart from the Missouri Anti-Trust Statute, that is to say, under Missouri common law, the *rule of reason* is recognized. In *Wiggins Ferry Co. v. Chicago & A. R. Co.* (1881) 73 Mo. 389, the Court held a certain contract with a restrictive covenant to be legal and stated: "We cannot say from anything appearing in the contract that such limitation is unreasonable, and it is not, therefore, obnoxious to the rule." This language was expressly approved in *Finck v. Schneider Granite Co.* (1905) 187 Mo. 244, 86 S. W. 213, where the court, holding a certain bargain illegal, said: "In determining the validity at common law of such com-

binations and contracts which are essential parts of them, the true test is whether they afford fair and just protection to the parties or whether they are so broad as to 'interfere with the interests of the public.'" *Angelica Jacket Co. v. Angelica* (1906) 121 Mo. App. 226, 98 S. W. 805, involved a certain bargain in restraint of trade attached to the sale of a business. In holding that the restraint was legal the Court approved the following passage from a standard author: "The existing state of the law, as deduced from the latest English and American authorities, is that which recognizes and enforces covenants of this nature, even though the restraint is general throughout an entire State or country, provided it is founded upon a sufficient consideration and is not unreasonable in view of the nature and extent of the business of the covenantee." *Gordon v. Mansfield* (1900) 84 Mo. App. 367, involved the sale by a physician of his practice and good will with a restrictive covenant which was held to be legal, the court saying: "If there is a reasonable limitation only and a consideration capable of supporting the agreement, it will be upheld." In *Mallinckrodt Chem. Wks. v. Nemnich* (1899) 83 Mo. App. 6, the court said: "A contract (for a valid consideration) of sale of a secret process for the manufacture or composition of drugs, of other matter or of machinery, used in trade, which restricts the vendor from using the same, or imparting his knowledge to others, or selling the same article, is a reasonable restriction when necessary for the protection of the vendee, and the article is not one of prime necessity to the general public."

From all the cases decided by the Missouri reviewing courts and by the Supreme Court of the United States, during the past seventy-five years, it is quite apparent that the final test as to the legality of any bargain in restraint of trade is the test of *public welfare* and this is true whether the action is at common law, in equity or under a statute. If the welfare of the public is actually injured or potentially threatened the courts will declare the bargain illegal. If the welfare of the public is not affected, the bargain will be upheld because within the domain of the individual liberty of the contracting parties. Possibly too much attention has been paid to the words *reason*, *reasonable* and *unreasonable*. If *reasonable* is defined as meaning *consistent with the public welfare*, then this Section 514 is in full accord with Missouri law, both unwritten and statutory. In the leading Missouri case on this topic *Presbury v. Fisher* (1853) 18 Mo. 50, the court said: "There is no practical man who would not smile at the conceit that the public welfare would sustain an injury by enforcing an obligation like that involved in the present case." For additional cases where welfare of the public was considered, see: *Bersch v. Fire Underwriters Ass'n of St. Louis* (Mo. 1922) 241 S. W. 428; *Vandiver v. Robert-*

*son* (1907) 125 Mo. App. 307, 102 S. W. 659; *St. Louis Gas-Light Co. v. St. Louis Gas, etc. Co.* (1884) 16 Mo. App. 52.

**Section 515. WHEN A RESTRAINT OF TRADE IS UNREASONABLE.**

A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

- (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or
- (b) imposes undue hardship upon the person restricted, or
- (c) tends to create or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or
- (d) unreasonably restricts the alienation or use of anything that is a subject of property, or
- (e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of goodwill or other subject of property or to an existing employment or contract of employment.

*Annotation:*

The principles underlying this Section are in harmony with Missouri law. "Dominant social and economic justification" must explain the legality of an ordinary labor union. See *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997.

As modified by *Clause (a)* the effect of the Section is recognized in *Long v. Towl* (1868) 42 Mo. 545, the court saying: "A contract prohibiting one of the parties from carrying on any specific trade or business, without limit as to time or place, is doubtless void; such contracts, to be binding, must have reasonable limitations as to the place. What would be reasonable limitations must greatly depend on the circumstances of each case. It must appear that such contract imposes no restraint upon one party that is not beneficial to the other. The prohibition should not extend any further than will fully protect the party for whose benefit the contract is made in his occupation or business. If the prohibition extends beyond this, it is an unreasonable restraint of trade, and will render the contract void."

As modified by *Clause (b)* the effect of the Section is illustrated by *Mallinckrodt Chem. Wks. v. Nemnich* (1899) 83 Mo. App. 6, where a restrictive covenant in a contract of employment was held void, the court saying: "This class of contracts is always regarded with suspicion by the courts, as their effect usually is to create a monopoly, and before any one of them will be upheld, it should clearly appear that no monopoly is created by it; that its

enforcement will not prejudice the public; that it is reasonable as to time, space and person, not oppressive or injurious, and that the contract is founded on a good consideration, and that its enforcement will be useful and beneficial to the promisee."

As modified by *Clause (c)* the effect of the Section is illustrated by many cases cited as illegal bargains in Annotation under Section 513. See also: *Dietrich v. Cape Brewery Co.* (1926) 315 Mo. 507, 286 S. W. 38, agreement to control and limit the retail ice business at Cape Girardeau; *State ex inf. Major v. International Harvester Co.* (1911) 237 Mo. 369, 141 S. W. 672, arrangement between competing manufacturers of farm machinery resulting in the creation of one master company is illegal; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997, while the mere organization of a labor union is legal, a union's institution of a boycott is illegal; *State ex rel. Hadley v. Kansas City Live Stock Exchange* (1908) 211 Mo. 181, 109 S. W. 675, rules of a live stock exchange held to be an illegal restraint of trade; *State ex inf. Crow v. Armour Packing Co.* (1903) 173 Mo. 356, 73 S. W. 645, agreement between meat packers to fix prices; *Walsh v. Ass'n of Master Plumbers* (1902) 97 Mo. App. 280, 71 S. W. 455, illegal bargains between master plumbers and manufacturers of plumbers' supplies giving private right of action to injured plaintiff.

As modified by *Clause (d)* the effect of the Section is illustrated by *Kessner v. Phillips* (1905) 189 Mo. 515, 88 S. W. 66, a clause in deed that grantee shall not dispose of property, following an absolute conveyance in fee simple, is void, on grounds of public policy. But a condition in a deed that real estate shall not be "sold, leased or rented to negroes for twenty-five years" is not void as against public policy. *Koehler v. Rowland* (1918) 275 Mo. 573, 205 S. W. 217.

As modified by *Clause (e)* the effect of the Section is recognized in *State ex rel. Youngman v. Calhoun* (Mo. App. 1921) 231 S. W. 647, where a restrictive covenant in a contract for the transfer of a physician's practice was erroneously construed by the trial court in a way that would have made the restrictive covenant illegal.

#### Section 516. INSTANCES OF REASONABLE RESTRAINTS.

The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly:

- (a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or business sold;

- (b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;
- (c) A bargain to enter into partnership with an actual or possible competitor;
- (d) A bargain by a partner not to interfere by competition or otherwise with the business of the partnership while it continues, or subject to reasonable limitations after his retirement;
- (e) A bargain to deal exclusively with another;
- (f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

*Annotation:*

The principles underlying this Section are in accord with Missouri law.

*Clause (a)* is illustrated by: *Hessel v. Hill* (Mo. App. 1931) 38 S. W. (2d) 490, sale of undertaking business at Liberty with restrictive covenant against competition and Court used words "reasonable" and "unreasonable" in construing contract; *State ex rel. Youngman v. Calhoun* (Mo. App. 1921) 231 S. W. 647, physician's home and office sold with restrictive covenant; *Counts v. Medley* (1912) 163 Mo. App. 546, 146 S. W. 465, sale of produce business "at" Rogersville with restrictive covenant which was violated by competition in another town one and one-half miles away, the court saying "common sense and good faith" are characteristics of all interpretations; *Mitchell v. Branham* (1904) 104 Mo. App. 480, 79 S. W. 739, sale of saloon at Portageville with covenant not to compete for three years.

The legality of the bargain described in *Clause (b)* is recognized in *Fleming v. Mulloy* (1910) 143 Mo. App. 309, 127 S. W. 105, where the owner of property at Monett promised to "sell or rent" the property "only to parties who agree to buy and handle Anheuser-Busch beer" when the promisee was the exclusive agent at Monett for said beer.

The soundness of *Clause (c)* is apparent from the decision in *Denny v. Guyton* (1931) 327 Mo. 1030, 40 S. W. (2d) 562, although the contract was for a joint adventure rather than a strict partnership. See also *Skrainka v. Scharringhausen* (1880) 8 Mo. App. 522.

The principle of *Clause (d)* is recognized in *Southwest Pump & Machinery Co. v. Forslund* (1930) 225 Mo. App. 262, 29 S. W. (2d) 165, the court saying: "The good will of the partnership business conveyed to the company by defendant and his partners, and its increment, became a part and parcel of the assets of the corporation", and defendant was enjoined from competing with the corporation that succeeded the partnership.

*Clause (e)* is illustrated by *Standard Fireproofing Co. v. St. Louis Fireproofing Co.* (1903) 177 Mo. 559, 76 S. W. 1008, bargain for exclusive right to use and vend in a limited territory a certain patent process for constructing floor tiling supported by promise not to use any other "similar" construction, is not against public policy and is a valid contract. See also *Wiggins Ferry Co. v. Chicago & A. R. Co.* (1881) 73 Mo. 389, valid contract of railroad to make use of one ferry only at St. Louis.

*Clause (f)* is illustrated by: *Athletic Tea Co. v. Cole* (Mo. App. 1929) 16 S. W. (2d) 735, employee's valid agreement not to engage in competitive business at town of Imperial for one year after termination of employment; *Garlichs Agency Co. v. Anderson* (Mo. App. 1920) 226 S. W. 978, agent bound by bargain not to engage in insurance business for five years after end of fifteen year term of employment. The principle of this Clause was recognized but held inapplicable to facts in *Mallinckrodt Chem. Wks. v. Nemnich* (1899) 83 Mo. App. 6, the words "unreasonable" and "reasonable" appearing in the court's opinion and also in the dissenting opinion.

#### Section 517. BARGAIN TO STIFLE COMPETITION IN COMPETITIVE BIDDING.

**A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.**

#### *Annotation:*

This Section is in accord with Missouri law. In *Miltenberger v. Morrison* (1866) 39 Mo. 71, after describing a possible secret combination to prevent the attendance of bidders at an auction sale, the court said: "Such arrangements are held to render the sale fraudulent and void, as a fraud upon the rights of the vendor and as against public policy." In *Engelman v. Skrainka* (1883) 14 Mo. App. 438, where a promise to refrain from bidding for public work was held unenforceable, the court said: "It is an uniform rule, founded on public policy, that any contract, the necessary effect of which is to stifle competition in bidding at public or private sales, or at lettings of public or private work, is

void." Auction sales of land were set aside because violative of the principle of this Section in the following cases: *Vannoy v. Duwall Trust Co.* (Mo. 1930) 29 S. W. (2d) 692; *Durfee v. Moran* (1874) 57 Mo. 374; *Neal v. Stone* (1855) 20 Mo. 294; *Wooton v. Hinkle* (1855) 20 Mo. 290. Bargains were held unenforceable in the following cases: *Springer v. Kleinsorge* (1884) 83 Mo. 152, land; *Hook v. Turner* (1856) 22 Mo. 333, land; *Pendleton v. Asbury* (1904) 104 Mo. App. 723, 78 S. W. 651, public printing. The principle was fully considered but held inapplicable to facts in *Vette v. Hackman* (1922) 292 Mo. 138, 237 S. W. 802.

#### Section 518. DIVISIBLE PROMISES IN RESTRAINT OF TRADE.

Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms, would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.

#### *Annotation:*

This Section is in accord with Missouri law. "The rule is, that where the condition of a bond is entire and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful and the others not, it is good for so much as is lawful, and void for the rest." *Presbury v. Fisher* (1853) 18 Mo. 50. The principle was applied as a rule of decision in: *Peltz v. Eichele* (1876) 62 Mo. 171, sale of match business with restrictive covenants, some valid and some invalid; *Pope-Turnbo v. Bedford* (1910) 147 Mo. App. 692, 127 S. W. 426, bargain for instruction supported in part by a valid promise and in part by an invalid promise.

#### Section 519. COLLATERAL EFFECT OF BARGAIN IN RESTRAINT OF TRADE.

The fact that one is a party to a previous illegal contract, agreement or combination with others, restraining competition in that business, does not invalidate a subsequent bargain by him that is neither in furtherance of an attempt to obtain a monopoly nor otherwise illegal; nor is a party to such a previous illegal contract or agreement deprived of legal protection of his property in the business.

*Annotation:*

This Section is *in accord with Federal law*. *Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431, was a suit to collect price for sewer pipe purchased by defendants and the defense was an allegation that plaintiff was part of a combination in illegal restraint of trade. The court said: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff." The case also held that the defense was not allowable under the Federal Anti-trust Act.

This Section is *not inconsistent with Missouri common law*, but is *at variance with Missouri statutory law* in so far as the latter is applicable to certain contracts. By the express terms of R. S. Mo. 1929, Section 8706, a corporation violating the anti-trust statute may "forfeit all or any part of the property of such corporation". By the express terms of R. S. Mo. 1929, Section 8709, "any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to" the Missouri statute "shall not be liable for the price or payment of such article or commodity". This defense was successfully relied upon in *Heim Brewing Co. v. Belinder* (1902) 97 Mo. App. 64, 71 S. W. 691. See also *National Lead Co. v. Grote Paint Co.* (1899) 80 Mo. App. 247. But the defense is not available when interstate commerce is involved because the statute applies only to transactions "within this State". *First National Bank v. Missouri Glass Co.* (1912) 169 Mo. App. 374, 152 S. W. 378.

It should be noted that the Missouri Anti-trust Statute is in the nature of a criminal statute and is strictly construed. *State ex rel. Star Pub. Co. v. Associated Press* (1901) 159 Mo. 410, 60 S. W. 91, statute is "highly penal". Those sections of the statute which specify the wrongs condemned are so phrased that they do not apply to bargains restricting professional and other personal services. See case last above cited, business of gathering and distributing news is one of mere personal service and beyond the scope of the statute. However, by Missouri common law such a bargain is sometimes said to be in restraint of trade, and may be legal or illegal according to circumstances. In *State ex rel. Youngman v. Calhoun* (1921) Mo. App. 231 S. W. 647, a restrictive covenant between physicians was expressly termed by the court a contract "in restraint of trade and personal liberty" but, when strictly construed, was upheld as legal. In *Harelsou v. Tyler* (1920) 281 Mo. 383, 219 S. W. 908, the by-laws of a voluntary association of hay dealers, as construed and acted upon by

the association, were expressly held not to violate the statute but were the basis for a civil conspiracy at common law.

### TOPIC C. *WAGER*.

#### Section 520. DEFINITION OF AND ILLEGALITY OF A WAGER.

A bargain in which a promisor undertakes that, upon the existence or happening of a condition he will render a performance

- (a) for which there is no agreed exchange, and
- (b) which does not indemnify or exonerate the promisee or a beneficiary of the bargain for a loss caused by the existence or happening of the condition

is a wager and is illegal.

#### *Annotation:*

*Statutes.* The Chapter on Gaming and Gambling Contracts in R. S. Mo. 1929, Sections 3005 to 3013, relates chiefly to matters of procedure and is chiefly designed to discourage wagering by creating and increasing civil liability of persons who assist in wagering activities. More than one hundred sections of R. S. Mo. 1929 relate to criminal aspects of wagering.

"Agreed exchange" is a new and useful technical term introduced by this Restatement and explained in Section 266 thereof. There may be such a thing as (1) an "agreed exchange" which is conditional on an uncertain event. (2) A conditional contract of indemnity is not an agreed exchange because the subject matter of the contract is a risk of loss—something which is hypothetical and not actual. See Section 292. (3) A conditional contract for the gratuitous benefit of a third person is not an agreed exchange so far as the third person is concerned, and is not necessarily a contract of indemnity. See Section 266.

This definition of a *wager* is carefully phrased so as to exclude from the domain of illegality: (1) above, (2) above, and (3) above. For an illustration of (1) above, see *Connell v. Hudson* (1893) 53 Mo. App. 418, a contract whereby A agreed to give and B agreed to take, for a certain steer, a sum of money equal to the amount of the unascertained loss which B had sustained on certain other steers shipped to market by B, and *held* this was not a wagering contract; it was a conditional contract for an agreed exchange. For an illustration of (2) above, consider any legitimate fire insurance policy where an owner insures his own property. See *Worth v. German Ins. Co.* (1896) 64 Mo. App. 583. For an illustration of (3) above, consider any legitimate life insurance policy where a man insures his own life, paying the

premiums with his own funds, for the gratuitous benefit of another person. See *Lee v. Equitable Life Assur. Soc.* (1916) 195 Mo. App. 40, 189 S. W. 1195.

This Section 520 is in accord with modern Missouri law, although by earliest Missouri law a gambling contract was legal in the absence of statute. *Waddle v. Loper* (1826) 1 Mo. 635. Illegal wagers are illustrated by many kinds of bargains. *Election bets: Hickerson v. Benson* (1843) 8 Mo. 8, bet on Harrison-Van Buren presidential election void by Missouri common law regardless of statute; *Dooley v. Jackson* (1904) 104 Mo. App. 21, 78 S. W. 330, bet on a primary election void on common law principles. For civil liability statute on election bets, see R. S. Mo. 1929, Section 3011. For criminal liability statute on election bets, see R. S. Mo. 1929, Section 4302. *Insurance policies where insurable interest is absent: Whitmore v. Supreme Lodge Knights of Honor* (1890) 100 Mo. 36, 13 S. W. 495, cousinship alone is not insurable interest; *Singleton v. St. Louis Mut. Ins. Co.* (1877) 66 Mo. 63, uncle-nephew relationship alone is not insurable interest; *Williams v. Peoples Life & Acc. Ins. Co.* (1931) 224 Mo. App. 1229, 35 S. W. (2d) 922, sister-in-law of insured does not necessarily have insurable interest even if contract is small industrial policy; *Reynolds v. Prudential Ins. Co.* (1901) 88 Mo. App. 679, adult brothers do not necessarily have mutual insurable interests. *Card games: Laytham v. Agnew* (1879) 70 Mo. 48, statutory action to recover losses at poker; *Clark v. King* (1914) 178 Mo. App. 381, 162 S. W. 669, suit on stated account defeated by allegation of card debt; *Crooks v. McMahon* (1892) 48 Mo. App. 48, statutory action to recover losses. *Racing bets: Shropshire v. Glascock* (1837) 4 Mo. 536, action to collect bet on horse race defeated by proof of facts; *Swaggard v. Hancock* (1887) 25 Mo. App. 596, statutory action to recover money lost on foot race. For cases of wagering in the guise of *produce exchange transactions*, see Annotation under Section 523.

#### Section 521. AN AGREEMENT FOR A PRIZE AS A WAGER.

An accepted offer of a prize to the winner in a competition, success in which does not depend on a fortuitous event, is not a wager, if the promisor does not compete for the prize.

#### Annotation:

This Section is in accord with Missouri law. In *Treacy v. Chinn* (1899) 79 Mo. App. 648, the seller of a race horse was to receive balance of agreed purchase price when the horse won a race, and when horse won the race and buyer received prize, seller was permitted to recover balance of price, although buyer de-

fended on ground of illegality. The case approved the following: "A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event." Contrast with the foregoing *Shropshire v. Glascock* (1837) 4 Mo. 536, where the promisor by his original agreement was himself to take part in a horse race for prizes promised, and when sued on his promise pleaded illegality and won the case.

#### Section 522. SPECULATIVE CONTRACTS THAT ARE NOT WAGERS.

An agreement is not one for wagering because of the fact that it

- (a) provides for the purchase or sale of securities, or other commodities on a margin, the remainder of the necessary capital being advanced by a broker or other person, or
- (b) provides for the purchase or sale at a future date of securities or other commodities, or
- (c) gives an option to one of the parties to purchase or sell securities or other commodities.

#### *Annotation:*

*Statutes.* An Act of 1887 (Laws of 1887, page 171), subsequently modified, and now known as R. S. Mo. 1929, Sections 4324 to 4329, has changed the common law of speculative contracts in Missouri. But these statutory provisions apply only to Missouri contracts, and not to contracts which although made in Missouri are to be performed in New York or Chicago. The law governing such contracts is the common law, which is the law on this point in New York and Illinois. *Edwards Brokerage Co. v. Stevenson* (1901) 160 Mo. 516, 61 S. W. 617, New York contract; *Gordon v. Andrews* (1927) 222 Mo. App. 609, 2 S. W. (2d) 309, Illinois contract; *Atwater v. Edwards Brokerage Co.* (1910) 147 Mo. App. 436, 126 S. W. 823, New York contract. As a result of this ruling, there are many Missouri cases involving speculative contracts, decided since 1887, which are expositions of the common law without regard to the Act of 1887. Before 1887 all speculative contracts in Missouri were decided by the common law. *Williams v. Tiedemann* (1878) 6 Mo. App. 269. The distinctive features of the Act of 1887 will be considered in Annotation under Section 523. For history of the Act of 1887 and modifications, see *Connor v. Black* (1893) 119 Mo. 126, 24 S. W. 184.

This Section 522 is in accord with the common law as announced by the courts of Missouri.

*Clause (a).* Illustrative cases: *Claiborne Com. Co. v. Stirten*

(Mo. App. 1924) 262 S. W. 387, money advanced by grain broker for account of his customer; *Gaylord v. Duryea* (1902) 95 Mo. App. 574, 69 S. W. 607, credit extended by stock broker for account of customer; *Williams v. Tiedemann* (1878) 6 Mo. App. 269, money advanced by cotton factor.

*Clause (b)*. Illustrative cases: *Gordon v. Andrews* (1927) 222 Mo. App. 609, 2 S. W. (2d) 809, December contract for delivery of corn during month of May following; *Deierling v. Sloop* (1896) 67 Mo. App. 446, June contract for January delivery of corn.

*Clause (c)*. The possible legality of option contracts was recognized in *Crawford v. Spencer* (1887) 92 Mo. 498, 4 S. W. 713 and *Lane v. Logan Grain Co.* (1904) 105 Mo. App. 215, 79 S. W. 722. For an option sale illegal because of its wagering nature, see *Waterman v. Buckland* (1876) 1 Mo. App. 45.

This Section is in accord with Missouri statutory law as applied to Missouri contracts, provided neither party to the contract intends the legitimate common law contract to be a mere scheme for gambling. See Annotation under Section 523.

#### Section 523. BARGAIN TO SETTLE FOR DIFFERENCES IN MARKET PRICES.

(1) A bargain purporting to be for purchase and sale is a wager if it is part of the bargain that no actual delivery of the subject matter shall be made, and that settlement between the parties shall be made on the basis of differences in market prices. But an undisclosed intention of one or both parties to a bargain does not invalidate it.

(2) A bargain for the purchase and sale of securities or commodities, originally legal, is not made illegal by a subsequent agreement between the parties to discharge their rights and duties by a payment based on the difference between the market price at the time of the original bargain and that at the time of the subsequent agreement.

#### *Annotation:*

*Subsection (1)* is in accord with the common law as expounded by Missouri courts both before and after the Act of 1887 now known as R. S. Mo. 1929, Sections 4324 to 4329. See Annotation under Section 522. The distinctive feature of the Act of 1887, as applied to contracts, is this. While at common law a speculative contract involving margins, futures or options, was not a wager unless *both parties* intended that there should be no actual de-

liveries but merely a settlement in cash based on fluctuations in price, under the Missouri Statutes the transaction is illegal and void if *either party* so intends, even if the other party is ignorant of such intention. It follows that the first sentence of this Subsection of Section 523 is in accord with Missouri law, but the second sentence is at variance with Missouri law. In *Johnson v. Kawne* (1886) 21 Mo. App. 22, there was a purported sale of hogs for future delivery in Missouri and both parties intended no actual delivery but a mere settlement of differences. The transaction was a wager by common law and of course would also be a wager under present statutory law. *Price v. Barnes' Estate* (1923) 300 Mo. 216, 254 S. W. 33, was a suit by a broker on a protracted margin account for grain bought and sold in St. Louis. Plaintiff probably intended deliveries but the jury found that defendant's testator did not intend deliveries and so under modern Missouri law the alleged contract was void. This case makes clear the *variance* between the Restatement and modern Missouri law. See also: *McVean v. Wehmeier* (1923) 215 Mo. App. 587, 256 S. W. 1085, bargain illegal because at least one party intended no delivery; *Scott v. Brown* (1893) 54 Mo. App. 606, bargain illegal because both parties intended no delivery; *Kent v. Miltenberger* (1883) 13 Mo. App. 503, showing harmony between Restatement and law of Missouri prior to 1887.

*Subsection (2)* is in accord with Missouri law. "It may sometimes happen that when the time arrives for performance, the seller, not having the goods on hand, finds that he must pay a higher price for them than that which his vendee has agreed to pay. The vendee, although entitled to actual delivery, is entitled to waive it, provided he can realize the same mercantile benefit that would accrue from the receipt of the goods and a sale of them at the market price. This may be effected by a settlement of differences with his vendor, who then pays him the amount of the net rise, instead of procuring and turning over the property. . . . no taint is thrown upon the original contract, which contemplated actual transfer and delivery." *Williams v. Tiedemann* (1878) 6 Mo. App. 269.

#### Section 524. RECOVERY OF MONEY DEPOSITED WITH STAKEHOLDER.

Where money is deposited with a stakeholder by parties to a wager, either party can recover the money deposited by him even after the happening of the condition upon which it was agreed that the money should be paid to the other party. Under no circumstances can either party recover more from the stakeholder; and the stakeholder is discharged from all duty if he pays the

winner of a wager before receiving notice of repudiation thereof by the loser.

*Annotation:*

R. S. Mo. 1929, Section 3012, relates specifically to the liability of a stakeholder when knowingly the custodian of money bet in a manner declared "gaming" by Missouri Statutes. There is also a broader common law liability of a stakeholder, which is often available when the statutory liability is not available. For important differences between the statutory liability and the common law liability of a stakeholder, see: *Dooley v. Jackson* (1904) 104 Mo. App. 21, 78 S. W. 330; *White v. Gilleland* (1902) 93 Mo. App. 310; *Weaver v. Harlan* (1892) 48 Mo. App. 319.

This Section 524, when compared with Missouri law, exhibits one *clear feature of variance*: By the Restatement a stakeholder is liable *after* the event bet upon if notified by the loser to return the deposit *before* actual payment has been made to the winner, but by Missouri common law the stakeholder is not liable to the loser if notice of repudiation is not made until *after* the event even if the money is not yet delivered to the winner. This was an express holding in *Dooley v. Jackson* (1904) 104 Mo. App. 21, 78 S. W. 330, a common law action because facts showed that the statute did not apply. In *Cutshall v. McGowan* (1903) 98 Mo. App. 702, 73 S. W. 933, a similar decision was made and the Missouri rule was said to be based upon Lord Mansfield's view of the common law.

When the action against a stakeholder is not based upon common law liability but upon statutory liability, then Missouri law on this point is *in harmony* with the Restatement. *Vandolah v. McKee* (1903) 99 Mo. App. 342, 73 S. W. 233; *Weaver v. Harlan* (1892) 48 Mo. App. 319.

Perhaps there is *another feature of variance*. The Restatement says that a party to a bet can never recover from the stakeholder more than was deposited by such party. In *Wimer v. Pritchard* (1852) 16 Mo. 252, the winner of a bet sued the loser (who never attempted to repudiate) and, garnishing the stakeholder, was entitled to judgment against the latter for the total of both deposits. This case suggests *variance*. But in *Hayden v. Little* (1865) 35 Mo. 418, the winner of a bet tried to recover in a direct action against the stakeholder money deposited by the other party to the bet and already returned after repudiation, and plaintiff lost the suit. This case suggests *accord*.

In all other aspects this Section 524 seems to be *in accord* with Missouri law. See cases already cited in this Annotation and also *Humphreys v. Magee* (1850) 13 Mo. 435, where there was repudiation of a bet on a horse race before the result of the race was determined.

**Section 525. RECOVERY OF MONEY LENT FOR WAGERING.**

(1) A promise to repay money lent for the purpose of being used for wagering is illegal; but knowledge that money lent will be used for that purpose does not make a promise to repay it illegal.

(2) A promise to repay money lent for the purpose of paying losses previously incurred in wagering is not illegal.

*Annotation:*

This entire Section is in accord with Missouri law. In *Barnhardt v. Strickland* (Mo. App. 1928) 8 S. W. (2d) 1079, a case on doubtful facts was remanded for a new trial and the remanding court said: "If plaintiff loaned defendant money solely to pay losses already suffered in a gambling deal forbidden by the statute, and not to be in any way used to continue or keep alive a pending transaction of that character, she could recover, even though she knew the purposes for which the money was to be used. But if she loaned money to defendant, to be used in 'playing the market', as plaintiff expressed it, that is, to deal in futures based on the rise or fall of the market price of any given property at a given time, and with no intention to deliver the property sold or receive delivery of property bought, and plaintiff knew at the time that the money was to be so used, and it was in fact so used, then she could not recover." (Authorities omitted.)

Additional cases illustrating *Subsection (1)*: *Elmore Grain Co. v. Stonebraker* (1919) 202 Mo. App. 81, 214 S. W. 216 suit on account stated for money advanced to be used in part for illegal speculation in grain; *Saunders v. Baker* (1907) 122 Mo. App. 294, 99 S. W. 51, bucket shop loan and "courts will pierce through attempted disguises, no matter how cunningly devised".

Additional cases illustrating *Subsection (2)*: *Lokey v. Rudy-Patrick Seed Co.* (Mo. App. 1926) 285 S. W. 1028, money advanced to pay election bet may be a valid loan; *Stewart v. Hutchinson* (1906) 120 Mo. App. 32, 96 S. W. 253, money loaned to pay debt already incurred in gambling on prices of wheat; *Searles v. Lum* (1901) 89 Mo. App. 235, money loaned to pay gambling debt "after the affair is over". The principle was extended to justify a successful suit in equity for an accounting after the receipt by one person of money collected on winning Louisiana lottery tickets owned in part by other persons, the trust agreement having been made after the drawings. *Roselle v. Beckemeir* (1896) 134 Mo. 380, 35 S. W. 1132.